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NO.

IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA

OCTOBER TERM, 1984

JACKIE LEE ATKINS,

PETITIONER

vs.

STATE OF TENNESSEE,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF TENNESSEE

PETITION FOR WRIT OF CERTIORARI

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Attorneys for Petitioner

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A. QUESTIONS PRESENTED FOR REVIEW

(1) Whether the trial court erred in permitting Tennessee Bureau of Investigation Agent Bowers to read from a report which stated that the defendant refused to take a polygraph test in violation of defendant's rights against self-incrimination, his right to trial by a fair and impartial jury, and his rights to due process and equal protection.

(2) Whether the trial court erred in allowing Dr. Harlan, a witness for the prosecution, to testify that, in his opinion, the injury in question was not self-inflicted in violation of defendant's right to trial by a fair and impartial jury and his rights to due process and equal protection.

(3) Whether the trial court erred in restricting counsel for the defendant to eight (8) peremptory challenges in a prosecution for murder in the first degree in violation of defendant's rights to due

process and equal protection and his right to trial by a fair and impartial jury.

(4) Whether the trial court erred in failing to give a complete charge to the jury of all lesser included offenses in a charge of murder in the first degree in violation of defendant's rights to due process and equal protection and his right to trial by a fair and impartial jury.

(5) Whether the evidence offered at trial was insufficient to support the defendant's conviction of murder in the first degree, whether the defendant's subsequent conviction violated his rights to due process and equal protection, and whether his resulting imprisonment therefore constitutes involuntary servitude.

B. PARTIES TO THE PROCEEDING

At trial, Paul G. Summers and Kerry Blackwood with the District Attorney General's Office represented the State of Tennessee. On Appeal, Ann Lacy Johns of the Attorney General's Office represented the State.

At trial and on appeal, James D. Causey and A. Wilson Wages represented the defendant.

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D. REFERENCE TO THE OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED IN THE COURTS BELOW

The opinion of the Court of Criminal Appeals for the State of Tennessee is not published but is reprinted as Appendix A to this petition. The order of the Supreme Court of Tennessee is not published but is reprinted as Appendix B to this petition.

E. JURISDICTIONAL STATEMENT

(1) The order of the Tennessee Supreme Court was dated and entered November 13, 1984.

(2) A rehearing was not requested, nor has an order been entered granting an extension of time within which to petition for certiorari.

(3) The petitioner anticipates no cross-petition for writ of certiorari.

(4) The jurisdiction of this Court is invoked under 28 U.S.C. §1257.

F. RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

(1) U. S. Const. Amend. V reprinted as Appendix C

(2) U. S. Const. Amend. VI reprinted as Appendix D

(3) U. S. Const. Amend. XIII, §1 reprinted as Appendix E

(4) U. S. Const. Amend. XIV, §1 reprinted as Appendix F

(5) Tenn. Const. art. I, §9 reprinted as Appendix G

(6) Tennessee Code Annotated §39-2-202 reprinted as Appendix H

(7) Tennessee Code Annotated §39-2-211 reprinted as Appendix I

(8) Tennessee Code Annotated §39-2-221 reprinted as Appendix J

(9) Tennessee Code Annotated §40-18-110 reprinted as Appendix K

(10) Tennessee Rules of Criminal Procedure 24(d) reprinted as Appendix L

G. STATEMENT OF THE CASE

Petitioner (hereinafter referred to as the defendant or Mr. Atkins) married Kimberly Diane Atkins (hereinafter referred to as the decedent or Mrs. Atkins) in June of 1980. The parties separated in June of 1982. On the date in question, the defendant owned a Corvette repair shop located in Millington, Tennessee. The decedent, a Petty Officer Third-Class in the United States Navy, was stationed at the Naval Air Station in Millington, Tennessee.

On October 5, 1982, after leaving work, the decedent stopped by the Going Western Gun Shop in Millington at approximately 3:30 to 3:45 P.M. She allegedly brought her gun, a Walthrup PPKS to the shop for repairs.

At approximately 4:50 P.M. on October 5, 1982, the decedent suffered a gunshot wound to the left chest. The injury occurred in the vicinity of the defendant's

mobile home which was located in a trailer park in Tipton County, Tennessee. The defendant immediately asked his neighbor, Randy Reed, for help. The defendant told Mr. Reed that his wife shot herself. Mr. Reed's wife called an ambulance while Mr. Reed waited with the defendant. The emergency service received the Reeds' call at approximately 4:52 P.M. and arrived on the scene at 5:02 P.M.

The emergency medical technicians called to the scene found Mrs. Atkins slumped in the driver's seat of the defendant's Corvette. Mrs. Atkins died as a result of the gunshot wound.

The technicians found a pistol, a Smith and Wesson Model 39-2, 9 millimeter, in the car seat with the decedent. They also found a wine glass, keys, a purse, a duffel bag and two bottles of wine in the car. When the police arrived, they failed to find a shell casing or the spent fatal

bullet.

At 8:30 P.M., the defendant made a statement to Tennessee Bureau of Investigation Agent Tony Bowers. Mr. Atkins maintained that the decedent came to his house trailer on the afternoon of October 5, 1982. According to Mr. Atkins, he was sitting in his trailer; she walked outside with a Smith and Wesson when he heard a shot. He jumped to the window and, then, ran out the door, first, to try to assist Mrs. Atkins, later to enlist Randy Reed's help.

During the November, 1982 term, the Circuit Court for Tipton County, Tennessee, handed down an indictment for first-degree murder against the defendant. The indictment alleged that the defendant willfully, maliciously, deliberately and pre-meditatedly murdered Kimberly Diane Atkins on October 5, 1982.

On November 1, 1982, the court issued

a capias for the defendant to appear before the circuit court and answer the indictment. The defendant posted a $5,000 bond on November 4, 1982. Prior to trial, counsel for the defendant filed a motion in limine for a hearing to determine the admissibility of certain statements which the State intended to offer. Counsel for the defendant also filed a motion to suppress evidence obtained in a warrantless search of the defendant's automobile, trailer, and surrounding area.

On July 15, 1983, counsel for the defendant filed a motion requesting the court to charge the possible penalties for the offense charged and all lesser included offenses. The court refused to do so and counsel for the defendant assigned the refusal as error on appeal.

Over defense counsel's objection, the trial court limited the defendant to eight (8) peremptory challenges. This error was

assigned in both state appellate courts.

At trial, the State presented the following witnesses in its case in chief:

1. Christen Marie Towery, the decedent's sister, who testified as to the decedent's background;

2. Craig Knox, the decedent's brother, who testified that the defendant made threatening statements against the decedent during the summer of 1982;

3. Howard Jerry and Gail Ellen Murphy Morgan, two emergency medical technicians, who attempted to treat the decedent on October 5, 1982;

4. Dr. Charles Harlan, a medical examiner, who testified as to the cause of death and gave an opinion as to whether the wound was self-inflicted (counsel for the defendant objected to this testimony at trial and assigned as error in both appellate courts the trial court's overruling of the objection);

5. Jeannine Morgan, a co-worker of the decedent, who attempted to testify that the decedent received a threatening phone call on October 5, 1982 at 2:15 to 2:20 P.M. but was not concerned about the call;

6. Robert Curtis Rosenbush, an employee of Going Western Gun Shop, who spoke with the decedent on the afternoon of October 5, 1982, prior to her death;

7. Randy Reed, a neighbor, who the defendant called on for help immediately after Mrs. Atkins suffered the gunshot wound;

8. John Short, an acquaintance of the defendant, who testified that the defendant threatened to kill Mrs. Atkins two weeks prior to October 5, 1982, but admitted he had said the same thing about his wife;

9. Jimmie Anderson, a Sheriff's Deputy, who testified as to the scene where Mrs. Atkins was found;

10. Tony Bowers, a Tennessee Bureau of

Investigation Agent, who took the defendant's statement on October 5, 1982, and who testified on re-direct examination that the defendant refused to take a polygraph test, which testimony prompted a motion for mistrial from counsel for defendant (the trial court refused the motion and refused curative instructions which counsel for defendant assigned as error on appeal);

11. Tommy Heflin, a Tennessee Bureau of Investigation Agent in firearms identification;

12. Dianne Konkoly, a Tennessee Bureau of Investigation Criminologist;

At the close of the State's proof, counsel for the defendant made a motion for acquittal. The trial court denied the motion. Counsel for the defendant later assigned as error on appeal the lack of evidence to support the conviction.

The defense offered three witnesses,

then renewed its motion for acquittal which the trial court denied.

The State based its theory of the case on the Medical Examiner's testimony that the wound was not self-inflicted. In addition, the prosecution emphasized that the defendant and the decedent were separated and the defendant allegedly made threats against the decedent. Finally, the prosecution argued that the defendant was present when the decedent suffered the gunshot wound and he was seen in the vicinity with an object in his hand.

The trial court charged the jury as to first and second degree murder but refused a charge on lesser included offenses.

On July 19, 1983, the trial court entered an order finding the defendant guilty of murder in the first degree. the court sentenced the defendant to life in the state penitenitary and revoked his bond.

Counsel for the defendant timely filed a motion for new trial which the court denied.

Counsel for the defendant then filed a notice of appeal.

Upon submission of briefs and oral argument, the Court of Criminal Appeals at Jackson handed down an opinion affirming the lower court's decision on July 26, 1984.

The Court of Criminal Appeals held that the facts presented at trial supported the jury's finding that the defendant was guilty of first degree murder.

The Court determined that the trial court did not err in permitting Dr. Harlan to give expert testimony to the effect that the gunshot wound was not self-inflicted.

Although the Court of Criminal Appeals noted that it would have been better practice to admonish the jury to disregard testimony to the effect that the defendant

refused to take a polygraph test, the appellate court found the evidence harmless beyond a reasonable doubt.

With respect to procedural issues, the Court of Criminal Appeals held that in prosecution of first-degree murder, where the state does not seek the death penalty, a defendant is entitled to eight (8) peremptory challenges rather than the fifteen (15) peremptory challenges allotted to capital cases under Rule 24(d) of the Tennessee Rules of Criminal Procedure. The Court of Criminal Appeals further determined that the trial jury did not err in failing to charge lesser included offenses.

The defendant timely filed an application for permission to appeal to the Tennessee Supreme Court which was denied by order dated November 13, 1984. By refusing the application, the Tennessee Supreme Court has, for all practical purposes, ratified

the Court of Criminal Appeals' decision.

H. ARGUMENT

According to Rule 17 of the Rules of the United States Supreme Court, the following list indicates the character of reasons that will be considered in granting a review on certiorari:

> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> (b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.
>
> (c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

The petitioner respectfully insists that the case before this Court satisfies the requirements of (b) and (c) in the following five respects.

1.

The trial court erred in permitting T.B.I. Agent Bowers to read from a report which stated that the defendant refused to take a polygraph test; furthermore, the court erred in failing to instruct the jury not to consider Agent Bowers' testimony in reference to the defendant's refusal to take the test. This action violated defendant's right against self-incrimination, his right to trial by a fair and impartial jury, and his rights to due process and equal protection.

Under Tennessee law, polygraph test results are inadmissible for any purpose. Nolan v. State, 568 S.W.2d 837, 840 (Tenn. Crim. App. 1978). Moreover, the circumstances accompanying the taking or not

taking of a polygraph test are inadmissible. Hembree v. State, 546 S.W.2d 235 (Tenn. Crim. App. 1976).

The accused's refusal to take a polygraph test is inadmissible not only in Tennessee but also in other jurisdictions surveyed. See, e.g., United States v. Bando, 244 F.2d 833 (2d Cir.), cert. denied, 355 U.S. 844 (1957) (witness testified that defendant refused to take lie detector test; since trial judge sustained objection, no unfavorable inference was created); Bowen v. Eyman, 324 F.Supp. 339 (D. Ariz. 1970) (petition for writ of habeas corpus granted in part because witness for the prosecution testified that defendant refused to take a polygraph test; despite trial court's curative instructions, testimony violated Fifth Amendment and denied petitioner a fair trial and due process); Commonwealth v. Crawford, 468 Pa. 565, 364 A.2d 660 (1976)

(defendant's refusal to take a polygraph examination was irrelevant to issue of guilt but relevant to issue of whether defendant knew he was a suspect in the case; first degree murder conviction reversed on other grounds); State v. Stafford, 213 Kan. 152, 515 P.2d 769 (1973), modified on other grounds and reh'g denied, 213 Kan. 585, 518 P.2d 136 (1973) (it was improper to mention defendant's refusal to take a lie detector test); State v. Green, 254 Iowa 1379, 121 N.W.2d 89 (1963) (instructions to jury to disregard prosecution's misconduct in referring to defendant's refusal to take lie detector test did not cure error); State v. Emory, 190 Kan. 406, 375 P.2d 585 (1962), cert. denied, 379 U.S. 906 (1964) (reference to defendant's refusal to take lie detector test was prejudicial error denying defendant's substantial rights; conviction reversed); State v. Chang, 46 Hawaii 22, 374 P.2d 5 (1962) (in spite of prosecution's

contention that statement was volunteered, it was prejudicial error to admit evidence that defendant had been asked if he would be willing to take a lie detector test); State v. Driver, 38 N.J. 255, 183 A.2d 655 (1962) (first degree murder conviction was reversed in part due to plain error committed when prosecution referred in opening statement to defendant's refusal to take lie detector test even though the defense did not object to such comment); Mills v. People, 139 Colo. 397, 339 P.2d 998 (1959) (first degree murder conviction reversed because evidence that defendant refused to take a lie detector test was admitted over defendant's objection); State v. Britt, 235 S.C. 395, 111 S.E.2d 669 (1959) (testimony that defendant refused to take a lie detector test was reversible error in conviction of murder, even though testimony was stricken and jury instructed to disregard); People v. Carter, 48 Cal.2d 737, 312 P.2d 665 (1957) (to admit testimony of

suspect to the effect that he had been willing to take a lie detector test was error because it implied that defendant refused and court allowed implication to stand; conviction reversed); State v. Kolander, 236 Minn. 209, 52 N.W.2d 458 (1952) (where conviction rested on circumstantial evidence alone, admission of evidence to the effect that the defendant refused a lie detector test was prejudicial error requiring a new trial); State v. Faught, 546 S.W.2d 515 (Mo. App. 1977) (it was prejudicial error to admit testimony that defendant refused to undergo lie detector test; conviction reversed and remanded); Commonwealth v. Williams, 224 Pa. Super. 298, 307 A.2d 289 (1973) (reference to refusal to take polygraph test was inadmissible; however, error was not fundamental nor did it deny accused fair trial because neither the prosecution nor the court

commented on such testimony or made use of it); State v. Hegel, 9 Ohio App. 2d 12, 222 N.E.2d 666 (1964) (admission of testimony to the effect that defendant refused lie detector test was error; where such testimony was first admitted over defendant's objection, and twice thereafter without curative instructions, error was prejudicial and conviction reversed); People v. Banos, 209 Cal. App. 754, 26 Cal. Rptr. 127 (1962) (trial judge conducted voir dire examination of witness outside presence of jury; trial judge correctly instructed prosecution that prosecution witness must omit from his testimony before jury any reference to suggestion that defendant take lie detector test; trial judge offered defense counsel option of pursuing questioning regarding the test on cross-examination which defense counsel declined to do; held no error); Rodriguez v. State, 170 Tex. Crim. App. 295,

340 S.W.2d 61 (1960) (where inexperienced defense counsel questioned defendant concerning lie detector test, state's proof of defendant's refusal to take test was admissible; however, conviction reversed due to defense counsel's inexperience). In the case before this Court, the prosecution called Agent Tony Bowers as a witness for the State. On cross- examination, counsel for the defendant questioned Agent Bowers about the circumstances surrounding a statement allegedly given to the Agent by the defendant and reduced to writing. Counsel for the defendant questioned Agent Bowers about oral statements made by the defendant but omitted from the written statement. In addition, counsel for the defendant questioned Agent Bowers as to whether Bowers made the report contemporaneously with the defendant's interview or whether the report was made from

notes jotted down after the interview with the defendant.

On re-direct examination, the Assistant District Attorney immediately asked that the notes made by Agent Bowers be made an exhibit to his testimony. Counsel for the defendant vigorously objected to any notes being offered into evidence. Counsel for the defendant based his objection on the fact that the notes were not made at the time Agent Bowers talked to the defendant; furthermore, the notes were not part of the res gestae or any statement taken from the defendant. The trial court overruled the defendant's objection and allowed the Assistant District Attorney to continue with his re-direct examination.

The Assistant District Attorney General first asked the Court for permission for Agent Bowers to read the first paragraph of the notes. The court assented. Immediately, the Assistant

District Attorney asked that the whole note be read into the record, which action the court allowed. The second paragraph of the report included the sentence "Subject Atkins later gave a written signed sworn statement but refused to take a polygraph test in reference to the shooting incident until he talked to his lawyer". Counsel for the defendant immediately asked to take the matter up with the court out of the presence of the jury. Counsel for the defendant then renewed his objection on the same basis that it was originally made and, in addition, noted that the statement just read contained highly prejudicial material to the defendant. Counsel for the defendant asked the court to grant a mistrial or, in the alternative, to admonish the jury members that they must not consider the information contained in the statement read into the record by Agent Bowers. The court refused the motion for mistrial and

refused the motion to instruct the jury.

On appeal, the State argued that defense counsel invited the error and was, therefore, precluded from assigning it as error on appeal. This contention is incorrect as a matter of fact and law.

According to Tennessee law, counsel should object to evidence when offered and before admitted. Harless v. State, 198 Tenn. 419, 225 S.W.2d 258, 259 (1949). As a general rule, objections need not be repeated. McCormick v. State, 135 Tenn. 218, 230, 186 S.W. 95 (1916). An objection should be specific; however, if evidence is palpably inadmissible for any purpose, a general objection or any kind or objection may be sufficient. Jones v. State, 184 Tenn. 128, 196 S.W.2d 491, 492 (1946). Tennessee appellate cases fall into four (4) categories with respect to treatment of alleged error at the trial level in admitting inadmissible evidence. The first

line of decision involves cases where no objection was made at all or the objection to inadmissible evidence was not made timely. See, e.g., Sturgis v. State, 199 Tenn. 558, 288 S.W.2d 434, 436-37 (1956); Turner v. State, 188 Tenn. 312, 219 S.W.2d 188, 193 (1949). In the second category, the trial court sustained objection to improper questioning. See, e.g., Bunch v. State, 3 Tenn. Crim. App. 481, 463 S.W.2d 956, 958 (1970). Under the third line of decisions, the trial court gave curative instructions. See, e.g., Anderson v. State, 512 S.W.2d 665, 669-72 (Tenn. Crim. App. 1974). In the fourth line of cases, admission of inadmissible evidence constituted grounds for reversal. See, e.g., Gray v. State, 191 Tenn. 526, 235 S.W.2d 20 (1950).

In the case before this Court, the defendant's refusal to take a polygraph test was evidence inadmissible for any

purpose. In the majority of jurisdictions surveyed, this action clearly would constitute prejudicial, reversible error.

Counsel for the defense made an objection prior to entry of the evidence into the record, and immediately upon entry moved for a mistrial or instructions. In view of the trial court's refusal to issue curative instructions, defense counsel's renewal of the objection prior to entry would have been futile. Since objection was timely made and the trial court overruled the objection and refused to issue curative instructions, the Court of Criminal Appeals' decision conflicts with decisions rendered in numerous other jurisdictions.

2.

The trial court erred in allowing Dr. Harlan to testify that, in his opinion, the injury in question was not self-inflicted. This action violated defendant's right to

trial by a fair and impartial jury and his rights to due process and equal protection.

At trial, the circuit court allowed Dr. Harlan not only to testify about the autopsy performed on the decedent, but also allowed the Medical Examiner to give an opinion about whether the wound was self-inflicted or not. In its opinion dated July 26, 1984, the Court of Criminal Appeals relied on the case of City of Columbia v. C.F.W. Construction Company, 557 S.W.2d 734, 741-42 (Tenn. 1977) for the proposition that Dr. Harlan's expert opinion testimony was admissible to establish the ultimate fact to be reached by the jury. The City of Columbia case, however, was a civil proceeding rather than a criminal prosecution.

Prior to the City of Columbia decision, the Tennessee Supreme Court outlined two requisites for the admission

of expert testimony - (1) the subject under examination must be one which requires knowledge or experience not possessed by laymen; and (2) the expert must possess this knowledge or experience. Casone v. State, 193 Tenn. 303, 246 S.W.2d 22, 26-27 (1952). With respect to wounds in criminal cases, the Tennessee Supreme Court had previously held that the admission of testimony to the effect that a would could not have been self-inflicted was error because the testimony addressed the ultimate fact to be reached by the jury. McCravy v. State, 133 Tenn. 358, 181 S.W. 165 (1915). The Tennessee Supreme Court had also determined that such evidence is incompetent, if not prejudicial. Moon v. State, 146 Tenn. 319, 242 S.W.2d 39 (1921).

In contrast, in the later case of Bryant v. State, 539 S.W.2d 816, 819 (Tenn. Crim. App. 1976), the Court of Criminal Appeals held that a doctor's opinion was

factually based and, consequently, admissible. The doctor in Bryant testified as to the location of entry and exit wounds and the angle of the wound. The doctor could not say that the wound was not self-inflicted.

Whether an expert witness can give an opinion upon an ultimate fact in issue varies from jurisdiction to jurisdiction. In some courts, an expert's opinion on the ultimate fact in issue improperly invades the province of the jury.[1] Some courts hold that the opinion is admissible if couched in terms which are not firm or

1. See, e.g., Webb v. Commonwealth, 204 Va. 24, 129 S.E.2d 22 (1963) (expert opinion testimony should have been excluded where expert witness testified that two deposit slips prepared by employee charged with embezzlement indicated a shortage and that unrecorded receipts were used to replace funds); Ramsey v. Commonwealth, 200 Va. 245, 105 S.E.2d 155 (1958) (case reversed and remanded where expert witness testified that fire was incendiary); State v. Molinar, 24 Conn. Supp. 160, 188 A.2d 69 (1962) (exclusion of question held proper

absolute.[2]

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where question was designed to elicit police officer's opinion as to whether defendant was travelling at an unreasonable speed in a prosecution for speeding).

2. See, e.g., State v. Martinez, 52 N.M. 343, 198 P.2d 256 (1948) (fire arms expert's testimony was held improper where he testified in murder prosecution that the fatal bullet was fired from defendant's gun; doctor's testimony to the effect that in his opinion the deceased died from a gunshot wound held admissible); Braley v. State, 54 Okla. Crim. 219, 18 P.2d 281 (1932) (although expert witness should have merely expressed an opinion as to identity of fingerprint, his positive identification was held harmless error); State v. Campbell, 213 Iowa 677, 239 N.W. 715 (1931) (ballistic expert's testimony that two bullets in question passed through same barrel held admissible); Evans v. Commonwealth, 230 Ky. 411, 19 S.W.2d 1091 (1929) (firearms expert permitted to give an opinion by testifying that bullet in evidence was fired from pistol in evidence; expert illustrated tool marks on different pistols by blackboard drawings so as to permit identification of bullets fired from different weapons); State v. Beaudin, 76 Wash. 306, 136 P. 137 (1913) (in prosecution for sodomy, state's witness was allowed to testify that the condition of the child's person might have resulted from acts constituting the crime; trial court erroneously excluded defense witness' testimony that other causes could have produced the condition); Costello v. State, 176 Ala. 1, 50 So. 202 (1912) (physician allowed to testify in a homicide case that wounds found on decedent were

The modern trend allows the opinion in evidence.[3]

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caused by falling against dresser but physician also testified that he hated to say whether it was probable that the wounds were so caused); Copeland v. State, 58 Fla. 25, 50 So. 621 (1909) (physician was allowed to testify as to symptoms of strychnine poisoning and that the decedent's condition could have resulted from strychnine poisoning); People v. Lang, 142 Cal. 482, 76 P. 232 (1904) (witness allowed to testify that same person wrote two exhibits); Davis v. State, 38 Md. 15 (1873) (examining physician was competent to testify in murder trial as to the kind of instrument in his opinion that could have inflicted the wounds; second physician was competent to testify whether wounds could have been caused by accidental fall).

3. See, e.g., State v. Moorer, 241 S.C. 487, 129 S.E.2d 330 (1963) (court permitted medical doctor to testify as to results of medical tests and examinations in prosecution for rape); State v. Ward, 10 Utah 34, 347 P.2d 865 (1959) (doctor's testimony that prosecutrix had been subjected to forcible sexual assault was held admissible); State v. Paglino, 319 S.W.2d 613 (Mo. 1958) (expert testimony to the effect that some highly flammable substance, such as gasoline, was present and that fire was incendiary in origin was admissible); State v. Fox, 248 Iowa 1394, 85 N.W.2d 608 (1957) (physician who examined defendant after arrest for operating a vehicle while intoxicated was properly permitted to testify that a person with a urine alcohol concentration of 330 milligrams per 100 cc. of urine was intoxicated in his opinion); Newton v.

Even under the third line of cases, admission of Dr. Harlan's testimony constituted reversible error in the case before this Court. Dr. Harlan did not qualify as a firearms expert, but yet testified as such.

Richard, 198 Va. 869, 96 S.E.2d 775 (1957) (motion to exclude toxicologist's findings in prosecution for operating an automobile under the influence of intoxicants should have been granted because blood analyzed was not sufficiently identified; upon reversal and remand, court prohibited toxicologist's comment giving opinion upon the accused's fitness to operate an automobile); People v. Maas, 145 Cal. App.2d 69, 301 P.2d 894 (1956) (testimony by experts that fire was of incendiary origin was properly admitted); People v. Cole, 47 Cal.2d 99, 301 P.2d 854 (1956) (examining pathologist was allowed to give opinion as to whether wound could have been self-inflicted in first degree murder prosecution); State v. Viola, 51 Ohio L. Abs. 577, 82 N.E.2d 306 (1947), appeal dismissed, 148 Ohio St. 712, 76 N.E.2d 715 (1947), cert. denied, 334 U.S. 816 (1948) (expert witness allowed to testify that fingerprint on state's exhibit matched defendant's finger); State v. Johnson, 37 N.M. 280, 21 P.2d 813 (1933) (a statement by a fingerprint expert that fingerprints on exhibit belonged to accused held not error); State v. Kuhl, 42 Nev. 185, 175 P. 190 (1918) (evidence of experts as to identity of palm prints held admissible in murder prosecution); People v. MacGregor, 178 Mich. 437, 144 N.W. 869 (1914) (doctors permitted to give opinion in murder case that the cause of death was arsenic poisoning); People v. Jennings, 252 Ill. 534, 96 N.E. 1077 (1911) (expert witness allowed to

The jury in the instant case had before it evidence sufficient to determine whether or not the wound was self-inflicted, i.e., the entry and exit points of the bullet, its path and angle, the presence of stippling, and the deceased's right-handedness. Introduction of Dr. Harlan's opinion testimony invaded the province of the jury. The case before this Court offers the opportunity to define the limits of expert testimony when that testimony goes beyond the witness' expertise.

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testify that two sets of fingerprints were made by the same person); Urga v. State, 155 So.2d 719 (Fla. App. 1963), cert. denied, 379 U.S. 829 (1964), reh'g denied, 379 U.S. 924 (1964) (testimony of doctor in prosecution for performing certain acts with intent to procure a miscarriage held admissible where doctor testified that his personal examination of prosecuting witness disclosed excessive bleeding, infection and expansion indicating recent pregnancy and that in his opinion an abortion had been induced); Wilbanks v. State, 42 Ala. App. 39, 151 So.2d 741 (1962), cert. denied, 275 Ala. 701, 151 So.2d 744 (1963) (testimony of doctor as to path of flight of bullet which killed alleged murder victim held admissible; case reversed on other grounds). See also Rule 704 of the Federal Rules of Evidence.

3.

The trial court erred in restricting the defendant to eight (8) peremptory challenges in its prosecution for murder in the first degree. This action violated defendant's rights to due process and equal protection and his right to trial by a fair and impartial jury.

According to Rule 24(d) of the Tennessee Rules of Criminal Procedure:

> "If the offense charged is punishable by death, each defendant is entitled to fifteen (15) peremptory challenges and the State is entitled to eight (8) peremptory challenges for each defendant. If the offense charged is punishable by imprisonment for more than one year, each defendant is entitled to eight (8) peremptory challenges and the state is entitled to four (4) peremptory challenges for each defendant. If the offense charged is punishable by imprisonment for less than one year or by fine or both, each side is entitled to three (3) peremptory challenges for each defendant."

A literal reading of the first

sentence of Rule 24(d) indicates that if the offense charged is first degree murder, the defendant is entitled to fifteen (15) peremptory challenges. In the case before this Court, the Court of Criminal Appeals relied on several unreported decisions for the proposition that a defendant is entitled to only eight (8) peremptory challenges in a capital case when the State does not ask for the death penalty. State v. John L. Bates, No. 813, filed at Knoxville, July 13, 1983, unreported; State v. David Carney, No. 81-25A-III, filed at Nashville, August 19, 1982, unreported; State v. Joseph Maurice Walker, No. 80-225-III, filed at Nashville, June 18, 1981, unreported. The Court also relied on two reported decisions, Cheairs v. State, 543 S.W.2d 70 (Tenn. Crim. App. 1976); Jenkins v. State, 509 S.W.2d 240 (Tenn. Crim. App. 1974).

The Cheairs and Jenkins decisions

rested on extraordinary circumstances, that is, Tennessee's death penalty statute had been held unconstitutional. In two previously reported decisions, Fowler v. State, 67 Tenn. (8 Bax.) 573 (1876) and Hooper v. State, 13 Tenn. (5 Yer.) 422 (1826), the Tennessee Supreme Court reversed the convictions because the trial courts erroneously limited the defendants' peremptory challenges. In Fowler, the trial court limited a defendant charged with feloniously breaking and entering a dwelling to ten (10) peremptory challenges. Because the offense was punishable by death, the Tennessee Supreme Court held that the defendant was entitled to twenty-four challenges.

In Hooper, the trial court limited a defendant charged with perjury to twelve (12) challenges. A statute allowed thirty-five (35) challenges in capital cases. The Tennessee Supreme Court reversed

a judgment of conviction, noting that perjury was a felony by statute and punishable with death on a second offense.

The case law on the appropriate number of peremptory challenges in capital cases is in conflict in other jurisdictions. For example, in Batten v. State, 533 S.W.2d 788 (Tex. Crim. App. 1976), the trial court limited a defendant charged with capital murder to ten (10) peremptory challenges. Although the prosecution had indicated that it would not seek the death penalty at trial, the Court of Criminal Appeals of Texas reversed the conviction based upon its conclusion that the category of the case, not the nature of the punishment, determined the number of peremptory challenges. Accord Kerley v. State, 89 Tex. Crim. App. 199, 230 S.W. 163 (1921), and Tillman v. State, 251 Ark. 529, 475 S.W.2d 529 (1972); but cf. People v. Holmes, 19 Ill. App.3d 814, 313 N.E.2d 297 (1974) and

United States v. Maestas, 523 F.2d 316 (2d Cir. 1975) (interpreting Rule 24(b) of the Federal Rules of Criminal Procedure).

The instant case presents the Supreme Court with the opportunity to settle an important question of law because various holdings by Tennessee courts conflict. In addition, holdings in other jurisdictions conflict.

4.

The trial court erred in its failure to give a complete charge to the jury of all lesser included offenses in the charge of murder in the first degree. This action violated defendant's rights to due process and equal protection and his right to trial by a fair and impartial jury.

Tennessee Code Annotated §40-18-110(a) provides:

> "It shall be the duty of all judges charging juries in cases of criminal prosecutions for any felony wherein two or more grades or classes of the defenses may be included in

> the indictment, to charge the jury as to all of the law of each offense included in the indictment, without any request on the part of the defendant to do so."

In the case before this Court, the trial court included in its charge first and second degree murder, Tennessee Code Annotated §§39-2-202 and 39-2-211, but not manslaughter, Tennessee Code Annotated §39-2-221.

There is a split of opinion among the federal circuit jurisdictions as to whether manslaughter is a lesser included offense of murder. In the following cases, the courts held manslaughter to be a lesser included offense of murder: United States v. Thompson, 492 F.2d 359 (8th Cir. 1974); United States v. Comer, 421 F.2d 1149 (D.C. Cir. 1970); United States v. Barbeau, 92 F.Supp. 196 (D.C. Alaska 1950) aff'd, 193 F.2d 945 (9th Cir. 19510, cert. denied, 343 U.S. 968 (1952).

In the following cases, the courts

determined that manslaughter was not a lesser included offense: United States v. Manuel, 706 F.2d 908 (9th Cir. 1983); Belton v. United States, 382 F.2d 150 (D.C. Cir. 1967).

The underlying circumstances in the Comer decision are analogous to the case before this Court. In Comer, a deceased wife bled to death from a stab wound in her left thigh. A jury found her husband guilty of second degree murder. The Court of Appeals for the District of Columbia reversed the conviction for failure to grant instructions on manslaughter. The Government's case against the defendant was entirely circumstantial. The element to be proven in second degree murder but not manslaughter was malice. Not only had the Government relied upon circumstantial evidence to infer malice, but it also relied on circumstantial evidence to infer that the defendant inflicted the wound. The defendant's theory was that he did not commit the act. Id. at 1154-55

(cited with approval in Keeble v. United States, 412 U.S. 205, 208 n. 7 (1973).

The trial court in the instant case gave instructions on first and second degree murder but failed to include manslaughter. In upholding the trial court's action, the Court of Criminal Appeals held that in this case the defendant introduced no evidence to contradict the State's evidence; moreover, the jury found the defendant guilty of "willful, deliberate, malicious and premeditated killing" by finding him guilty of first degree rather than second degree murder.

If permitted to stand, the Court of Criminal Appeals' decision will erode a basic tenant of our criminal justice system; that is, a defendant is considered innocent until proven guilty. In a criminal prosecution, the State must prove guilt beyond a reasonable doubt. By using hindsight to justify the charge to the jury

in the case at bar, the Court of Criminal Appeals neglected the prejudicial influence of an incomplete charge on a jury's deliberations. If permitted to stand, the decision conflicts with various decisions rendered by federal courts of appeal, particularly the Comer decision.

5.

The evidence offered at trial was insufficient to support the defendant's conviction of murder in the first degree. Defendant's subsequent conviction violated his rights to due process and equal protection and, therefore, his resulting imprisonment constitutes involuntary servitude.

Tennessee Code Annotated §39-2-202 defines first degree murder as follows:

> "39-2-202 - First degree murder. (a) Every murder perpetrated by means of poison, lying in wait, or by other kind of willful, deliberate, malicious, and premeditated killing, or committed in the perpetration of, or attempt to perpetrate, any murder

in the first degree, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or the unlawful throwing, placing or discharging with destructive device or bomb, is murder in the first degree.

(b) A person convicted of murder in the first degree shall be punished by death or by imprisonment for life.

(c) Murder in the first degree is a Class X felony.

The prosecution in the case before this Court offered virtually no direct evidence that a crime was committed. The State produced no witnesses who saw the defendant shoot the decedent. The defendant did not confess to shooting the decedent. The defendant did not flee after the shooting nor did he attempt any coverup. The prosecution merely offered circumstantial evidence - the parties' separation; alleged threats against the decedent, one of which was inadmissible in evidence, one of which was remote in time, and one of which was made in jest; opinion

evidence of the medical examiner; the defendant's presence at the scene of the injury. In order to convict on circumstantial evidence under Tennessee law, the circumstances must exclude every hypothesis other than guilt. Crouch v. State, 498 S.W.2d 97, 99 (Tenn. 1973). The evidence offered by the State at trial wholly failed to establish willful, deliberate, malicious, or premeditated billing. At most, the jury inferred malice based upon circumstantial evidence. See United States v. Comer, 421 F.2d 1149 (D.C. Cir. 1970), discussed supra.

Coupled with the State's failure to establish the elements of first degree murder, was the prosecution grounded on circumstance alone. With the failure to grant the statutorily allotted number of peremptory challenges and with admission of the highly prejudicial testimony of Tennessee Bureau of Investigation Agent Bowers and Dr. Harlan, the trial court permitted an atmosphere to develop during the trial which denied the petitioner rights secured by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. His resulting imprisonment violates the Thirteenth Amendment to the United States Constitution.

For the foregoing reasons, the defendant respectfully requests this Court to grant his petition in this cause for a Writ of Certiorari to the Supreme Court of Tennessee to hear and decide his case on oral argument and briefs.

Respectfully submitted,

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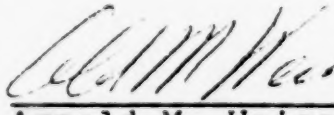
January, 1985.

CERTIFICATE OF SERVICE

I, Arnold M. Weiss, Attorney for Petitioner, hereby certify that I have this 9 day of January, 1985, pursuant to Rule 28 of the Supreme Court Rules, caused to be served upon Ann Lacy Johns, Assistant Attorney General, 450 James Robertson Parkway, Nashville, Tennessee 37219-5025, and Paul G. Summers, District Attorney General, State of Tennessee, 16th Judicial Circuit, 302 Market Street, Somerville, Tennessee 38068, copies of the foregoing Petition for Writ of Certiorari filed by Jackie Lee Atkins, by placing copies of the same in the United States mail, properly addressed, and with sufficient postage affixed thereto.



Arnold M. Weiss

84-1118

No.

Supreme Court, U.S.
FILED
JAN 11 1985
ALEXANDER L. STEVAS
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA

OCTOBER TERM, 1984

JACKIE LEE ATKINS,

PETITIONER

vs.

STATE OF TENNESSEE,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF TENNESSEE

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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IN THE COURT OF CRIMINAL APPEALS
AT JACKSON
APRIL 1984

STATE OF TENNESSEE, APPELLEE	)	No. 3,
	)	Tipton Criminal
	)	Honorable Herman
vs.	)	L. Reviere, Judge
	)	(First Degree
	)	Murder)
JACKIE LEE ATKINS, APPELLANT	)	

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	Paul G. Summers District Attorney Somerville, Tenn.
	J. Kerry Blackwood Asst. Dist. Atty. Somerville, Tenn.

AFFIRMED

LLOYD TATUM, JUDGE

OPINION RELEASED: July 26, 1984

O P I N I O N

The defendant, Jackie Lee Atkins, was convicted of first degree murder and sentenced to a life term in the State penitentiary. After considering the several issues presented, we conclude that the judgment of conviction must be affirmed.

We first address the issue attacking the sufficiency of the evidence. The defendant was convicted of the shooting death of his 28-year-old wife, Kimberley Dianne Atkins, on October 5, 1982. The defendant and the victim had been separated since June, 1982. The victim was a Petty Officer in the United State Navy stationed at the

Naval facility at Millington. The defendant ran a Corvette repair shop in Millington. According to the victim's brother, Craig Knox, the defendant did not know the address of telephone number of the victim and telephoned him two times one day in September, 1982. On both occasions, he informed Craig Knox that he was going to kill the victim.

The victim's supervisor at the Naval Station was Janine Morgan. Between 2:15 and 2:20 P.M. on October 5, Ms. Morgan answered the telephone and recognized a voice that she had learned to be that of the defendant. The victim came to the telephone and after a conversation, the victim held the telephone so that Ms. Morgan could hear the defendant threaten to kill the victim. Ms. Morgan testified that she left the victim at the Naval station at about 2:50 P.M. on October 5. When Ms. Morgan left, the victim was in a "great

mood". She was "jolly and frolicking and she was going to get drunk." The victim was going to have her gun checked because it was jammed.

John Short testified that he knew both the defendant and the victim. Approximately two weeks before he heard of Kimberley Atkins' death, and while Mr. and Mrs. Atkins were separated, the witness was at the defendant's house trailer drinking beer with him. During a conversation, Mr. Short recalled the defendant stating with respect to his wife, "If the son of a bitch comes up here, I'll kill her."

Robert Curtis Rosenbush testified that he ran a gun shop in Millington and sold the victim a Walther PPKS pistol and ammunition. On October 5, 1982, at around 3:30 or 3:45 P.M., she brought the pistol to the store for repairs. The pistol had jammed. The victim waited about 35 minutes while the gun was repaired. While in the

store, she bought a case for the pistol. He identified the gun case and box of 380 Winchester ammunition taken from victim's Corvette as items that he sold to the victim. When the victim left the gun store, she was very happy.

Randy Reed testified that he lived across the street from the defendant, with approximately 100 yards separating their houses. On October 5, Mr. Reed drove into his yard at 4:50 P.M. and got out of his truck. The defendant was standing at a blue Corvette in his yard and yelled for Mr. Reed to help him, saying that his wife had shot herself. Reed went into his house and told his wife to telephone the police and an ambulance. Reed looked out a window and saw the defendant at a red Corvette that he used for parts, located about 20 yards from the blue Corvette. The defendant had "something in his hand." At that point, Mr. Reed was distracted by his

wife's telephone conversation and didn't see what the defendant did with the object in his hand.

Mr. Reed further testified that as he started out of his house, the defendant was at the door. They went together to view the victim in the blue Corvette and at the witness' suggestion, they went to the truck and waited for the ambulance to arrive. The ambulance arrived in 7 to 10 minutes. The defendant was not excited and appeared to be sober.

Howard Jerry and Gail Morgan, emergency medical technicians, testified that they arrived at the defendant's residence at approximately 5:52 P.M., responding to a call. As the witnesses and another technician drove into the driveway at the defendant's residence, they observed two men standing beside a truck, calmly conversing. The two men ignored the ambulance until the witnesses asked where

they could locate the patient, then they were told "over there." When asked if they meant in the trailer, the men indicated that the "patient" was in a blue Corvette convertible parked at the trailer.

Howard Jerry was the first to examine the victim. When he first observed her in the driver's seat of the Corvette, she was slumped down. He observed an automatic pistol wedged between the driver's seat and the console. The barrel was pointing upward. Keys were on the console of the Corvette and a wine glass was between the victim's legs. The automatic pistol appeared to be jammed. The technicians removed the victim from the automobile to check her vital signs. It was immediately determined that the victim was dead and they observed an injury to her upper left chest. No spectators came to the scene.

Dr. Charles Warren Harlan, a

forensic pathologist, testified that he conducted an autopsy on Kimberley Dianne Atkins. She died as a result of a near gunshot wound to the chest. The bullet enetered at a point above the left nipple below the collarbone and exited at the rear of the right armpit. The bullet reentered the rear of the upper right arm and exited again above the right elbow. The entry wound was one-half inch higher than the exist wound in the back. There was stippling (flesh burned by hot lead and burning powder coming from the muzzle of the gun) around the entry to the chest wound. Dr. Harlan also testified that the autopsy revealed blue bruises to the right side of her neck, the back of her left hand, the right thigh, and middle of the left shin. He found a brown bruise on her right shoulder and multiple brown bruises on the inside of both thighs. There was an abrasion on her right wrist

and a pink contusion on the front of her right thigh.

There was stippling also found on the back of the left hand which was similar to that found at the entrance wound in the chest. The stippling on the hand was concentrated around the knuckles of the ring and little fingers.

Dr. Harlan was of the opinion that the muzzle of the pistol was between 0 and 9 inches, and probably between 3 and 5 inches, from the skin surface when the fatal shot was fired. The wound produced extensive bleeding in the chest. Blood was inhaled into the lungs. One would live less than 5 minutes with the wound inflicted.

Dr. Harlan was of the opinion that the wound was not self-inflicted. The straight line from the entry of the bullet at the left upper chest, exiting at the rear of the right arm pit with reentry into

the upper arm and an exit above the right elbow, precludes the possibility that the pistol could be fired with the right hand. the stippling on the back of the left hand indicated that it was in front of the muzzle of the gun at the time of discharge, precluding the possibility that the gun was held in the left hand when discharged.

None of the officers or medical personnel were able to find either a shell casing or a spent bullet in the vicinity of the blue Corvette convertible. Nor was the victim's Walther PPKS automatic pistol ever found. Deputy Sheriff Jimmy Anderson, who arrived at the scene at 4:52 P.M., testified that he observed a glass on the floorboard, a green Navy pouch on the seat, a paper sack containing a bottle of wine, and a pistol wedged between the bucket seat and the console. Car keys were on the console. The green pouch from the rear seat of the car contained overnight

clothes, dirty clothes, a box of 380 cartridges, a new gun pouch, and other items. There was another bottle of wine in the car which had not been opened. A cash register receipt indicated that the wine had been purchased at 3:09 P.M. The green gun pouch or case was empty but had the fresh smell of machine oil or WD-40.

TBI Agent Tony Bowers interviewed the defendant at approximately 7:30 P.M. The defendant had alcohol on his breath but appeared calm and rational. After waiving his Miranda rights, the defendant gave a written statement, saying:

> "My wife's name is Kimberly (sic) Diane (sic) Atkins. We have been separated since the end of June. She is in the Navy at Millington. She has been living somewhere else in a house trailer. Last night, she came to my trailer and spent the night with me. She left this morning going to the base at ten minutes till 7:00. I worked on her car until 11:00 A.M. She came to my garage until about twenty minutes till 12:00. About 3:00 P.M., she called me from our trailer. I went on home after she

called. When I got home, she was sitting inside drinking some Jack Daniels whiskey. I fixed myself a couple of drinks and she had a couple of drinks. We went outside and she shot her gun at a can. She started talking about killing herself. She walked outside and carried the 9 millimeter pistol, automatic with her. I was sitting in my big green chair. I heard a shot. I jumped up and went to the window. I ran out the door and reached over in the car, it's a convertible and I grabbed her and tried to get her out. I ran across the street and tried to get Randy to get some help. He called the ambulance. I stayed over by the truck until the ambulance got there."

Agent Bowers testified that in the initial interview, the defendant said he had never before seen the pistol found in the victim's car. The defendant first said that he had not fired a gun within the 24 hours preceding the shooting, but after he was told a gun powder residue test would be taken, the defendant changed his story. He then said he and the victim had been target shooting. He also changed his story by saying that he recognized the pistol as

that belonging to his wife. The defendant then gave the aforesaid written statement. Agent Bowers was unable to locate the PPKS Walther 380 automatic pistol. The defendant denied any knowledge of it.

The pistol wedged between the driver's seat and console of the victim's automobile was a Smith & Wesson MOdel 39-2 nine millimeter semi-automatic pistol. It was examined by TBI Agent Tommy M. Heflin, an expert firearms examiner. When the pistol was received by Agent Heflin, there was a Remington Peters nine millimeter cartridge partially jammed in the chamber, holding the bolt open approximately one-half inch. The cartridge was tilted so that it could not feed into the chamber. After removing the jammed cartridge, the pistol was fired repeatedly without malfunction. When the gun is fired, the spent cartridge is ejected.

Agent Heflin examined the victim's

T-shirt. Partially burned and burned gunpowder was heavily concentrated around the hole in the front upper left panel. No residue was found in a hole at the lower right armpit section. By test firing the gun at various distances for comparison of the gunpowder residue with that on the front of the T-shirt, Agent Heflin concluded that the fatal shot was not fired in direct contact with the T-shirt but was fired from less than 18 inches from it.

Dianne Conkoly, a TBI criminologist, testified that she analyzed gunshot residue kits with respect to both the victim and the defendant. One of the tests obtained from the defendant and both obtained from the victim revealed a significant concentration of elements indicative of gunshot residue, indicating that both the defendant and the victim could have fired or handled a gun.

The defendant did not testify but

introduced two witnesses. Gerald Orman, a neighbor who lived one or two blocks away from the defendant's trailer, testified that he heard one gunshot. He subsequently saw the defendant running up the road hollering for Randy Reed to help him, saying, "My wife's been shot; come over here and help me." The defendant sounded upset and excited. Mr. Orman heard no screams, argument, or loud talking preceeding the gunshot.

Mr. Orman's wife, Lois Orman, testified that she had just left her mailbox when she heard a shot. She heard the defendant yell for Randy Reed to help, and thought she heard him say, "My wife's been shot." She could not hear Reed's response, but heard the defendant say, "Man, don't be that way." She heard nothing prior to hearing the gunshot.

In attacking the sufficiency of the evidence, the defendant insists that the

circumstantial evidence does not exclude every reasonably hypothesis other than his guilt. He argues that the shooting could have been self-inflicted or inflicted by a third party. We think that the fatal wound could not have been self-inflicted for the reasons stated by Dr. Harlan. The evidence strongly infers that only the defendant and the victim were on the premises when the shooting occurred. This fact precludes a reasonable hypothesis that the fatal wound was inflicted by a third party.

The defendant also insists that there was no evidence of deliberation, premeditation, and malice and that the shooting could have been accidental. There was evidence that the defendant told the victim, her brother, and his friend that he intended to kill his wife. Immediately after the shooting, the defendant was cool and composed. He immediately represented to his neighbor and later to an investi-

gating officer that his wife shot herself after threatening to do so. The Walther automatic pistol which the victim had in her possession less than one hour before her death was never found; nor were the shell casings and spent bullets ever found, even though no spectators tampered with the scene and the victim's newly purchased pouch for the missing pistol was still in her belongings. Immediately after the fatal shot was fired, the defendant was seen in the vicinity of a red junked Corvette with something in his hand. There was no one to remove these items other than the defendant.

Also significant is the defendant's theories or inconsistent statements regarding his and the victim's handling of guns on the afternoon of her death and the positive result of the gunpowder residue test conducted on the defendant. Another factor is that the victim was shot under

the wheel of her car, under circumstances indicating that she was in the process of leaving the scene. Stippling found on her left hand indicated an effort on her part to shield herself from the fatal bullet.

We think that the facts support the jury's finding that the defendant was guilty of first degree murder. Whether premeditation, deliberation, and malice are present in a given homicide case are questions of fact to be determined by the jury from all circumstances in evidence. State v. Garland, 617 S.W.2d 176 (Tenn. Crim. App. 1981) and the cases therein cited. We find sufficient evidence upon which a rational trier of fact could be convinced beyond a reasonable doubt of the defendant's guilt of first degree murder. The evidence of guilt meets the standard required by Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) and Rule 13(e), T.R.A.P. This issue is

without merit.

In another issue, the defendant says that the trial court erred in permitting Dr. Harlan to give expert testimony that the gunshot wound was not self-inflicted. The defendant cites State v. McCravy, 133 Tenn. 358, 181 S.W. 165 (1915) and Moon v. State, 146 Tenn. 319, 242 S.W. 39 (1922) for the proposition that expert opinion testimony is not admissible to establish the ultimate fact to be reached by the jury. Both of these cases dealt with the question of whether gunshot wounds could have been self-inflicted.

In Bryant v. State, 539 S.W.2d 816 (Tenn. Crim. App. 1976), this court held that expert testimony of this nature did not invade the province of the jury, although the expert witness could not say whether the gunshot wound was self-inflicted. We think any question on this proposition has been resolved contrary to

the holdings of the McCravy and Moon cases by the Tennessee Supreme Court in City of Columbia v. C.F.W. Const. Co., 557 S.W.2d 734, 741, 742 (Tenn. 1977). The court stated:

> "In National Life & Accident Insurance Co. v. Follett, 168 Tenn. 647, 80 S.W.2d 92 (1935), this Court determined that where expert information is necessary for intelligent decision of an ultimate issue it does not matter that the opinion and one solution to the ultimate issue coincide. It is only when the trier of fact is as competent as the expert to determine an issue that the opinion of an expert has been held to be inadmissible, because unnecessary. See D. Paine, Tennessee Law of Evidence §177 (1974). Moreover, in our view the better rule is that an expert's opinion is not objectionable merely because it embraces an ultimate issue to be decided by the trier of facts; so long as it is helpful to the court. See Federal Rules of Evidence, Rule 704. Accordingly, we conclude tht it was error for the Chancellor to exclude the testimony of the expert in this instance."

Dr. Harlan was shown to be an experienced forensic pathologist and a medical examiner for Shelby County and the

State of Tennessee. He actually performed the autopsy on the victim. When Dr. Harlan was asked his opinion as to whether the gunshot could have been self-inflicted, a jury-out hearing was held. Dr. Harlan testified that he had made between 400 and 500 determinations on whether a given wound was self-inflicted. His expertise included the effect of gunshot wounds on the human body as well as the mechanical limitations of the arms and hands. He described in detail how his determination was made, explaining the locations of the entrance and exit wounds, the path of the bullet, the location of stippling on the left hand and the entry wound to the chest, and all other pertinent details. Using the pistol, the doctor demonstrated that it was physically impossible for the deceased to have shot herself. The doctor's reasons for his opinion were clearly shown to the jury.

The allowance of expert testimony is within the discretion of the court. Bryant v. State, supra. It appeared to the trial judge, and we agree, that the evidence was helpful to the court. We think that the admission of this evidence was a sound exercise of the trial court's discretion.

In another issue, the defendant says that the court erred in restricting him to eight peremptory challenges. He insists that since he was indicted and tried for first degree murder, he was entitled to 15 peremptory challenges. Rule 24(d) of the Tennessee Rules of Criminal Procedure provides that if an offense is punishable by death, each defendant is entitled to 15 peremptory challenges. If the offense charged is punishable by imprisonment for more than 1 year, each defendant is entitled to 8 peremptory challenges. The trial judge granted the defendant only 8 challenges. We point out that the State

did not ask for the death penalty in this case, nor was the death penalty issue submitted to the jury.

Our court, in dealing with this issue, has held that where the death penalty question is not to be submitted for the jury's consideration, then a defendant is entitled to only 8 peremptory challenges. State v. John L. Bates, No. 813, filed at Knoxville July 13, 1983 (unreported); State v. David Carney, No. 81-25A-III, filed at Nashville August 19, 1982 (unreported); State v. Joseph Maurice Walker, No. 80-225-III, filed at Nashville June 18, 1981 (unreported). Also see Cheairs v. State, 543 S.W.2d 70 (Tenn. Crim. App. 1976); Jenkins v. State, 509 S.W.2d 240 (Tenn. Crim. App. 1974). We adhere to these holdings.

The defendant next states that the trial court erred in failing to charge the jury on the lesser included offenses to

murder in the first degree. The trial court charged the jury on first degree murder and second degree murder but did not instruct the jury on voluntary and involuntary manslaughter.

If there is any evidence that reasonable minds could accept as to any such lesser offenses, the accused is entitled to appropriate instructions regarding the lesser offenses. Johnson v. State, 531 S.W.2d 558 (Tenn. 1975); T.C.A. §40-18-110(a). However, the practice of charging lesser included offenses where there is no evidence to support them, is not favored. State v. Mellons, 557 S.W.2d 497 (Tenn. 1977); Whitwell v. State, 520 S.W.2d 338 (Tenn. 1975).

In this case, there was no evidence introduced by the defendant contradicting the State's evidence. Defendant did not testify but prior to trial told others that the victim committed suicide. It would

have been pure speculation for the jury to have found that the defendant committed the offense upon a sudden heat produced by adequate provation or that the defendant did not intend death nor bodily harm when he shot the victim, and that death was accidentally caused by some unlawful act or an act not unlawful in itself but done in an unlawful manner and without due caution. since there was no evidence to support a finding of either degree of manslaughter, the trial judge did not err in failing to charge these offenses.

Moreover, the jury found the defendant to be guilty of "willful, deliberate, malicious, and premeditated killing," by finding him guilty of first degree murder instead of second degree murder. Having declined to convict the defendant of second degree murder, it would be folly to speculate that the jury might have found him guilty of manslaughter. If

there was error, it was harmless.

Finally, the defendant complains that the trial judge erred in permitting TBI Agent Bowers to read from a report that the defendant refused to take a polygraph test and in declining to instruct the jury to disregard this evidence.

On direct examination, Agent Bowers testified that he interviewed the defendant at 7:30 P.M. on October 5, 1982, after advising him of his Miranda rights. The agent again interviewed the defendant at 8:30 P.M. when the previously quoted written statement was obtained. The witness then described discrepancies between the two initial oral statements and the written statement given by the defendant.

On cross examination, defense counsel questioned the witness at length regarding the oral and written statements he obtained from the defendant. Defense

counsel questioned the witness in detail concerning notes the witness made relating to the oral statements made by the defendant. The agent noted that defense counsel had been given a copy of his notes. Defense counsel obtained a typed copy of the notes which was passed to the witness and identified as a report submitted by the agent to the District Attorney General's Office. Counsel was then shown a handwritten copy of the same notes which was made immediately after the witness talked with the defendant.

On redirect examination, the prosecutor sought to have the notes made an exhibit and admitted into evidence. Defense counsel made a general objection but failed to relate to the court that the notes contained a reference that the defendant refused to take a polygraph test until he talked with his lawyer.

After the note was read to the jury,

defense counsel moved for a mistrial or for an admonition to the jury that the information contained in the report concerning the polygraph test not be considered. The trial judge ruled:

> "Mr. Causey (defense counsel), the Court allowed you to see the notes and to extract them from him with some trouble and see them and the question of the polygraph was not brought up before the Court prior to the reading and the Court allowed them because they had been brought out in cross-examination, so your motion for a mistrial and the motion to instruct the jury, will be overruled."

In making the original objection, defense counsel owed a duty to inform the court that the notes contained the reference to the polygraph test. This fact was not known to the court when he originally ruled upon the objection. See Patterson v. State, 184 Tenn. 39, 195 S.W.2d 26 (1946); Cooper v. State, 123 Tenn. 37, 138 S.W. 826 (Tenn. 1911). Under these circumstances, the trial judge did

not err in originally overruling the objection. Although the objection was not in proper form when contemporaneously made, we think that it would have been the better practice to admonish the jury to disregard this evidence. It is well settled that evidence is not admissible that a defendant declined to take a polygraph test. Marable v. State, 203 Tenn. 440, 313 S.W.2d 451 (1958). But, we do not find that the error, considering the whole record, more probably than not affected the judgment or resulted in prejudce to the judicial process. The agent's testimony that the defendant gave conflicting information is undisputed. As stated, the other substantial evidence of the defendant's guilt is undisputed. We find the evidence harmless beyond a reasonable doubt. See Rule 36(b), T.R.A.P.

It results that the judgment of the trial court is affirmed.

LLOYD TATUM, JUDGE

CONCUR:

MARTHA CRAIG DAUGHTREY, JUDGE

JERRY SCOTT, JUDGE

IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

STATE OF TENNESSEE, Appellee,	)	
v. C.C.A. No. 3	)	TIPTON CRIMINAL
JACKIE LEE ATKINS, Appellant.	)	

O R D E R

Upon consideration of the application for permission to appeal and the entire record in this cause, the Court is of the opinion that the application should be denied.

PER CURIAM

CONSTITUTION OF THE UNITED STATES

AMENDMENT 5

Criminal actions - Provisions concerning - Due process of law and just compensation clauses - No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

CONSTITUTION OF THE UNITED STATES

AMENDMENT 6

Rights of the accused. - In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

CONSTITUTION OF THE UNITED STATES

AMENDMENT 13

§1. Slavery prohibited. - Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

CONSTITUTION OF THE UNITED STATES

AMENDMENT 14

§1. Citizenship - Due process of law - Equal protection. - All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Sec. 9. Right of the accused in criminal prosecutions. - That in all criminal prosecutions, the accused hath the right to be heard by himself and his counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof, to meet the witnesses face to face, to have compulsory process for obtaining witnesses in his favor, and in prosecutions by indictment or presentment, a speedy public trial, by an impartial jury of the County in which the crime shall have been committed, and shall not be compelled to give evidence against himself.

39-2-202. First-degree murder. -

(a) Every murder perpetrated by means of poison, lying in wait, or by other kind of willful, deliberate, malicious, and premeditated killing, or committed in the perpetration of, or attempt to perpetrate, any murder in the first degree, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or the unlawful throwing, placing or discharging of a destructive device or bomb, is murder in the first degree.

(b) A person convicted of murder in the first degree shall be punished by death or by imprisonment for life.

(c) Murder in the first degree is a Class X felony.

39-2-211. Second-degree murder. -

(a) All other kinds of murder shall be deemed murder in the second degree.

(b) Murder in the second degree is a Class X felony, but no offense covered under the provisions of §39-2-231, concerning vehicular homicide, shall be considered as a Class X felony.

TENNESSEE CODE ANNOTATED

§39-2-221.

39-2-221. Manslaughter. -

Manslaughter is the unlawful killing of another without malice, either express or implied, which may be either voluntary upon a sudden heat, or involuntary, but in the commission of some unlawful act.

40-18-110. Charge as to included offenses - No disclosure that trial involves Class X felony. -

(a) It shall be the duty of all judges charging juries in cases of criminal prosecutions for any felony wherein two or more grades or classes of offense may be included in the indictment, to charge the jury as to all of the law of each offense included in the indictment, without any request on the part of the defendant to do so.

(b) On the trial of all Class X felonies, but specifically excepting pleas of guilty which are heard by the trial court without the intervention of a jury, the trial judge shall not charge, the attorneys shall not argue and it shall not

be otherwise disclosed to the jury that the trial involves a Class X felony.

RULE 24(d)

(d) Number of Peremptory Challenges. - If the offense charged is punishable by death, each defendant is entitled to fifteen peremptory challenges and the state is entitled to eight peremptory challenges for each defendant. If the offense charged is punishable by imprisonment for more than one year, each defendant is entitled to eight peremptory challenges, and the state is entitled to four peremptory challenges for each defendant. If the offense charged is punishable by imprisonment for less than one year or by fine or both, each side is entitled to three peremptory challenges for each defendant.

CERTIFICATE OF SERVICE

I, Arnold M. Weiss, Attorney for Petitioner, hereby certify that I have this 9 day of January, 1985, pursuant to Rule 28 of the Supreme Court Rules, caused to be served upon Ann Lacy Johns, Assistant Attorney General, 450 James Robertson Parkway, Nashville, Tennessee 37219-5025, and Paul G. Summers, District Attorney General, State of Tennessee, 16th Judicial Circuit, 302 Market Street, Somerville, Tennessee 38068, copies of the foregoing Appendix to Petition for Writ of Certiorari filed by Jackie Lee Atkins, by placing copies of the same in the United States mail, properly addressed, and with sufficient postage affixed thereto.

Arnold M. Weiss